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October 17, 2000

RECEIVED

OCT 17 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.  
Office of the Secretary  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W.  
12th Street Lobby, TW-A325  
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: In the Matter of Applications of America Online, Inc. and  
Time Warner, Inc. for Transfer of Control (CS Docket 00-30)

Dear Ms. Salas:

Enclosed for filing in the above-captioned proceeding is an original and four copies of a letter from Samuel W. Morris, Jr., Senior Vice President - General Counsel of Digital Access, Inc. addressing the proposed AOL/Time Warner merger. Copies have been sent to Chairman Kennard and the Commissioners, as well as to the applicants and other commenting parties, as set forth in the attached service list.

Please address any questions to the undersigned.

Very truly yours,



William L. Fishman

Enclosure

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No. of Copies rec'd  
List A B C D E

0+4

# digitalaccess

The next generation digital broadband service provider

Samuel W. Morris, Jr.  
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**FEDERAL COMMUNICATIONS COMMISSION  
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Re: In the Matter of Applications of America Online, Inc. and  
Time Warner, Inc. for Transfer of Control (CS Docket 00-30)

Dear Ms. Salas:

Digital Access is a small company which is establishing competitive MVPD alternatives in a number of urban areas, including Milwaukee, Kansas City, Nashville, Indianapolis and Jacksonville. Our business plan is to rely on all-digital facilities to provide our customers with access to the highest quality, state-of-the-art technology. However, in a number of markets, most immediately in Milwaukee, we have discovered that we cannot get access to local sports programming because of existing exclusive arrangements between incumbent cable operators and program vendors.

The bulk of local sports programming in Milwaukee is provided by Midwest Sports Channel, whose programming includes away and home games of the Milwaukee Brewers and the Milwaukee Bucks. When we sought a license to carry that channel we were told that the incumbent cable operator, Time Warner Cable, has an exclusive right to the programming. If a new competitor like Digital Access cannot negotiate for the right to carry local sports programming our ability to penetrate the Milwaukee (or any other) MVPD market is sharply limited. This is so because local sports programming is essential for any cable overbuilder. Whatever else we can bring to the customer in terms of new technology, lower rates, better service or other superior products or services, we are at a significant disadvantage selling our product in the Milwaukee area market without Midwest Sports Channel.

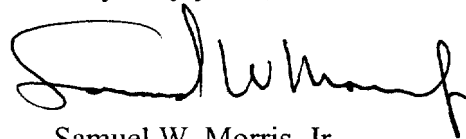
Because Time Warner is not affiliated with the owners of Midwest Sports Channel § 628 of the Communications Act, the program access provision, offers no relief to Digital Access as

Magalie Roman Salas  
October 17, 2000  
Page 2

interpreted by the Cable Services Bureau of the FCC.<sup>1</sup> However, Time Warner is a vertically integrated cable operator with numerous programming affiliates. Given the high interest in encouraging competitive entry into the MVPD market, I urge the Commission to give consideration to requiring, as a condition of the merger, that Time Warner agree not to contract, either as a cable operator or as a programming vendor, for exclusive programming arrangements. Any such existing exclusivity arrangements should similarly be declared unenforceable as a condition to the merger. Such conditions would go a long way to assure that competitive entry is not stifled by programming exclusivity arrangements. We understand that Time Warner is already subject to a nondiscrimination obligation under a consent decree entered into in 1997 with the Federal Trade Commission.<sup>2</sup> However, that decree terminates in 2007 and does not impose any obligations on Time Warner to avoid entering into exclusivity contracts with unaffiliated program vendors.

Please feel to call upon me if I can be of any further help to you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sam W. Morris, Jr.", with a stylized, cursive script.

Samuel W. Morris, Jr.

cc: The Honorable William Kennard, Chairman  
The Honorable Harold Furchtgott-Roth, Commissioner  
The Honorable Susan Ness, Commissioner  
The Honorable Michael Powell, Commissioner  
The Honorable Gloria Tristani, Commissioner

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<sup>1</sup> See, e.g., *Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sports Channel*, 14 FCC Rcd 10500 (CSB, 1999).

<sup>2</sup> *Time Warner, Inc.*, FTC File No. 961-0004 (1997)

## CERTIFICATE OF SERVICE

I hereby certify that on the 17<sup>th</sup> day of September, 2000, a copy of the foregoing letter from Sam Morris In the Matter of Applications of American Online, Inc. and Time Warner, Inc. for Transfer of Control was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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